OCT 30 1964

JOHN F. DAVIS, CLERK

No. 244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation; and JOHN HOWELL, an Individual.

Petitioners.

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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Petitioners respectfully request a rehearing of its Petition for Certiorari, denied by the Court's Order of October 12th, 1964.

To refresh the Court as to the nature of the case: Petitioners filed a Motion to Dismiss in the U.S. District Court, alleging that Congress usurped its authority and unconstitutionally delegated the power to the Respondent to act as party plaintiff in a civil proceeding, and as a result, the Respondent had no legal standing in court.

The Motion was denied, bond for appeal was set, and an appeal was taken to the U.S. Court of Appeals for the Seventh Circuit.

After the Petitioners had filed bond and filed its Abstract and Briefs, the Respondent filed a Motion to Dismiss the appeal, alleging as its only point that since the Order appealed from was an Order denying a Motion to Dismiss, the Order was not final or appealable.

The Court of Appeals for the Seventh Circuit, without a written opinion and without considering the merits of the appeal or issues presented by the appeal, granted the Respondent's Motion to Dismiss the appeal.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. The apparent holding of the Court of Appeals is that any order denying a motion to dismiss is not a final appealable order and the Court need not look further. The aforesaid is the only legal and logical conclusion because the only issue raised by the Respondent in the motion to dismiss the appeal was that since the order appealed from was an order denying a motion to dismiss, the order was not final or appealable.

The aforesaid fact was not pointed out to this Honorable Court in the Petition for Writ of Certiorari. As a result, when this Court denied the Petition for Writ of Certiorari, it affirmed a holding that is in irreconcilable conflict with previous decisions of this Court and a conflict now exists between the Fifth and Seventh Circuits of the Courts of Appeal.

2. In the case of *United States of America* v. *John Q. Woods, et al.*, 295 F. 2d 772 (1961), Certiorari denied 369 U.S. 850, 8 L. Ed. 2d 9, 82 S. Ct. 933 (1962), the Court

of Appeals from the Fifth Circuit in deciding whether or not an order is final and appealable as prescribed by 28 U.S.C.A., Section 1291, held at page 778:

> "On the basis of these cases, we feel that the Supreme Court has approved a *practical* construction of Section 1291, and that an order, otherwise non-appealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealable under Section 1291." (Emphasis Added)

In *Cohen* v. *Beneficial Indus. Loan Corp.*, (1949), 337 U.S. 541, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528, this Court held that the purpose of Section 1291 is to disallow appeal from any decision which is tentative, informal or incomplete, or from a consummated decision which is a mere step towards a final judgment with which it will merge. The Court found, however, that the collateral issue involved in that case was not of such a nature, and went on to state:

> "When that time comes (to appeal the final disposition of the case), it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

This Court then held the order to be appealable within the meaning of Section 1291, and concluded:

> "This Court has long given this provision of the statute this practical rather than technical construction."

The aforesaid rule was later summarized by Mr. Justice Frankfurter in his concurring opinion in *Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U.S. 427, 441, 76 S. Ct. 895, 903:

> "Thus the Court has permitted appeal before completion of the whole litigation when failure to do so would preclude any effective review or would result in irreparable injury."

The constitutional rights of a citizen of the United States preclude Congress from enacting legislation which violate the doctrine of separation of powers and the due process clause of the Fifth Amendment. The right of the Respondent to act as a party plaintiff has been challenged as a violation of the Petitioners' aforementioned constitutional rights by the only procedural means available, to-wit: "motion to dismiss".

If an order denying a motion to dismiss under the aforesaid circumstances is not appealable, then the holding of this Court in the *Cohen* case, *supra,* is meaningless, because: to compel the Petitioners to wait until the final disposition of the case, would be too late to effectively review the order denying the Petitioners' motion to dismiss. The constitutional rights of the Petitioners, if applicable, would be lost, because they would be forced to proceed to defend while their constitutional rights cry out to prohibit anyone to compel them to defend such an action. Once the petitioners are compelled to defend, their constitutional right has been lost.

This case presents the question of whether standards set by this Court in determining the appealability of an order may be eroded away by the Courts of Appeal which do not even purport to find that which this Court has said is the *sine qua non* for holding an order to be appealable or non-appealable.

One of the landmark cases in the law, *Hickman* v. *Taylor*, 329 U.S. 495, would not exist if this Court did not, on occasion, review its denial of petitions for certiorari. (327 U.S. 808, 328 U.S. 876). The case at bar merits the review of this Court.

CONCLUSION.

For the reasons set forth herein and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon rehearing, a Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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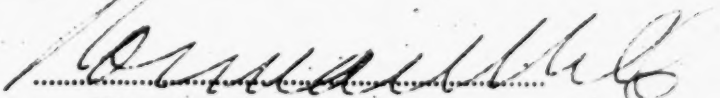
CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.



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